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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Jeanette Sullivan, Herbert Sullivan, Jr. and)
10 Nicole Sullivan, individually and on behalf)
11 of the heirs of decedent Jerome K.W.)
12 Sullivan; Jeanette Sullivan individually,))
13 and on behalf of the heirs of decedent Ean)
14 S. Sinyella; Jeanette Sullivan, Herbert)
15 Sullivan, Jr. and Nicole Sullivan)
16 individually, and on behalf of the heirs of)
17 decedent Aralla M. Sullivan; and Augusta)
18 Sullivan individually, and on behalf of the)
19 heirs of decedent Travell K. Sullivan,)

20 Plaintiffs,)

21 vs.)

22 BNSF Railway Company, fka The)
23 Burlington Northern Santa Fe Railroad)
24 Company; Matthew Kelley McCauley, aka)
25 Matthew Kelly McCauley and Joel)
26 Frederick Briggs,)

27 Defendants.)
28

No. CV-06-0207-PHX-ROS

ORDER

29 Pending before the Court is Plaintiff's Motion to Remand. (Doc. 16) For the
30 following reasons, the Court will grant the motion and remand the case.¹
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¹The Court did not set this matter for oral argument because the parties submitted memoranda thoroughly discussing the law and evidence in support of their positions, and oral argument would not have aided the Court's decision. See Mahon v. Credit Bur. of Placer County, Inc., 171 F.3d 1197, 1200 (9th Cir. 1999).

I. BACKGROUND

On December 15, 2005, Plaintiffs filed a lawsuit in Maricopa County Superior Court. The suit alleged multiple counts of wrongful death under Arizona state law based on the negligence of the Defendants. The incident giving rise to the cause of action involved a collision between a train, owned and operated by Defendant BNSF, and a vehicle containing the decedents on a railroad crossing on the Hualapai Reservation, Arizona. (Compl. ¶ 13) The claim of negligence against Defendant BNSF includes multiple allegations such as the failure to warn, failure to provide adequate sight distance, and failure to sound an adequate whistle. (Compl. ¶ 20) Within the allegations of negligence, Plaintiffs make reference to recommendations in *The Railroad Highway Grade Crossing Handbook* (a publication of the United States Department of Transportation) and duties under the Code of Federal Regulations. (Id.)

On January 13, 2006, Defendants filed a Notice of Removal. (Doc. 1) In that Notice, Defendants asserted that there are issues of federal law implicated in the action and that four of the allegations in the complaint are completely preempted. (Id. at 3) Plaintiffs later filed a Motion to Remand arguing that no federal jurisdiction exists because all claims arise under Arizona or Hualapai Tribal law. (Doc. 16, p. 2)

II. ANALYSIS

The federal removal statute allows for removal of a case only if the federal court would have had original jurisdiction over the action. 28 U.S.C. § 1441(a) (allowing removal of a "civil action brought in a State court of which the district courts of the United States have original jurisdiction"). Defendants' notice of removal was premised on federal jurisdiction under 28 U.S.C. § 1331. That statute provides federal jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

The removal statute is strictly construed against removal jurisdiction. *See Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941). *See also Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Mesa Indus., Inc. v. Eaglebrook Prods., Inc.*, 980 F. Supp. 323, 324 (D. Ariz. 1997). There is a "strong presumption" against removal jurisdiction, and

1 "[f]ederal jurisdiction must be rejected if there is *any doubt* as to the right of removal in the
2 first instance." Gaus, 980 F.2d at 566 (emphasis added); see Mesa Indus., 980 F. Supp. at
3 324. "The 'strong presumption' against removal jurisdiction means that the defendant always
4 has the burden of establishing that removal is proper." Gaus, 980 F.2d at 566. Defendants
5 assert that federal question jurisdiction exists in this case based on either the presence of
6 federal issues or complete preemption of multiple allegations. (Doc. 23)

7 The conditions for federal question jurisdiction were recently set out by a unanimous
8 Supreme Court. Those conditions are that the claims "necessarily raise a stated federal issue,
9 actually disputed and substantial, which a federal forum may entertain without disturbing any
10 congressionally approved balance of federal and state judicial responsibilities." Grable &
11 Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 125 S. Ct. 2363, 2368 (2005). Deciding if
12 there is federal jurisdiction is determined by analyzing Plaintiffs' Complaint. "Whether the
13 complaint states a claim arising under federal law must be ascertained by the legal
14 construction of [the plaintiff's] allegations, and not by the effect attributed to those
15 allegations by the adverse party." Ultramar America Ltd., v. Dwelle, 900 F.2d 1412, 1414
16 (9th Cir. 1990) (internal citations omitted). Plaintiffs' Complaint consists of approximately
17 twenty-five allegations supporting their claim of negligence. (Compl. ¶ 20-23) In their
18 allegation that Defendants were negligent in failing to provide adequate sight distances,
19 Plaintiffs reference the recommendations of *The Railroad Highway Grade Crossing*
20 *Handbook*. (Id. ¶ 20(d)) Plaintiffs also list duties under the Federal Code of Regulations for
21 railroad track safety standards. 49 C.F.R. § 213. (Id. ¶ 20(i)) Within that list of duties,
22 Plaintiffs mention the Federal Railroad Safety Act ("FRSA") stating that "any person who
23 knowingly and willfully falsifies a record or report required by this part may be subject to
24 criminal penalties, under 49 U.S.C. § 21311." (Id. ¶ 20(vi)) However, this is the only
25 reference to FRSA Plaintiffs make within their Complaint and they make no mention of the
26 Locomotive Boiler Inspection Act ("LBIA") in their allegations.

27 **A. Federal Issues**

1 The first basis Defendants provide for federal question jurisdiction is that Plaintiffs'
2 claim depends on interpretation of federal statutes and regulations, and Plaintiffs' request for
3 punitive damages implicates the Due Process Clause. (Doc. 23, pp. 3-4) In determining
4 whether there is federal question jurisdiction, the Court has to distinguish between federal
5 issues that "are basic and those that are collateral, between disputes that are necessary and
6 those that are merely possible." Gully v. First Nat'l Bank, 299 U.S. 109, 118 (1936).
7 Plaintiffs' Complaint only makes reference to federal law in two of their twenty-five
8 allegations. In addition, Plaintiffs use the federal statutes as a standard by which to measure
9 Defendants' negligence, not necessarily for the assertion that Defendants violated the statute
10 and thus should be liable. It is clear from the face of the Complaint that the federal issues
11 are not necessary to Plaintiffs' claims. In addition, if a claim raises alternate theories of
12 liability, under federal or state law, there is no federal jurisdiction unless resolution under the
13 state law theory requires interpretation of federal law. See Christianson v. Colt
14 Indus. Operating Corp., 486 U.S. 800, 810 (1988) (unanimous court) (holding that because
15 there are reasons unrelated to federal law which could entitle the plaintiff to relief, the claim
16 does not arise under federal law); Ultramar, 900 F.2d at 1414 ("[T]hat an alternative theory
17 of relief exists for each claim . . . not dependent upon federal law, is itself grounds to defeat
18 federal question jurisdiction.") (relying on Christianson); Baker v. BDO Seidman, LLP, 390
19 F. Supp. 2d 919, 925 (N.D. Cal. 2005) (finding plaintiffs' allegations raised alternative
20 theories of liability, and were capable of being decided without federal law, thus they did not
21 necessarily raise a federal issue and failed Grable test for jurisdiction). In this case,
22 Plaintiffs' claim of negligence can be decided under state common law without reference to
23 federal law.

24 In addition, the federal issues are not "substantial" in this case. Grable, 125 S. Ct. at
25 2367. Federal jurisdiction "demands not only a contested federal issue, but a substantial one,
26 indicating a serious federal interest in claiming the advantages thought to be inherent in a
27 federal forum." Id. A mere citation to a federal act by the Plaintiffs does not implicate a
28 substantial federal interest. Campbell v. Aerospace Corp., 123 F.3d 1308, 1315 (9th Cir.

1 1997). In Campbell, the court held that a citation to a federal act in support of one of the
2 elements of a tortious discharge claim did not create federal question jurisdiction because the
3 citation did not implicate a "compelling federal judicial interest" nor did the citation "alter
4 the fundamental nature of [the] state-law tort action." Id. Also, there was "an alternative
5 state-law theory" supporting the plaintiff's claims. Id. In the present case, Plaintiffs made
6 mere references to federal regulations and guidelines to support their claim that Defendants
7 were negligent; Plaintiffs' claims remain based on state tort law, which Plaintiffs can succeed
8 on without interpretation of federal law. Defendants argue that the federal government's
9 substantial interest in a uniform system for railroad safety is demonstrated by the existence
10 of statutes and regulations, such as FRSA. (Doc. 23, p. 5) However, they fail to cite any
11 cases to support this argument, only citing FRSA language that "railroad security shall be
12 nationally uniform to the extent practicable." 49 U.S.C. § 20106. The Court finds that there
13 is no substantial federal interest in a wrongful death state claim based on negligence when
14 federal regulations are only cited to assist in establishing a standard by which to measure the
15 negligence.

16 Defendants' argument regarding the implication of the Due Process Clause with
17 respect to punitive damages also does not create federal question jurisdiction. While the
18 Defendants certainly can raise the Due Process issue, it does not create federal question
19 jurisdiction. In determining "whether the claim arises under federal law, we examine the
20 'well pleaded' allegations of the complaint and ignore potential defenses." Beneficial Nat'l
21 Bank v. Anderson, 539 U.S. 1, 6 (2003). Because the due process issue is only a "potential
22 defense[]" to Plaintiffs' claims for punitive damages, it can not provide a basis for federal
23 jurisdiction. Id.

24 **B. Complete Preemption**

25 Defendants' second basis for federal question jurisdiction is that FRSA and LBIA
26 completely preempt state law. (Doc. 23, p. 7) Generally, federal preemption may be raised
27 as a defense, but a federal defense is not grounds for removal to federal court. Caterpillar
28 Inc., v. Williams, 482 U.S. 386, 392-93 (1987); see also Washington v. American League

1 of Prof'l Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972). An exception to this is when
2 "the pre-emptive force of a statute is so extraordinary that it converts an ordinary state
3 common-law complaint into one stating a federal claim for purposes of the well-pleaded
4 complaint rule." Caterpillar, 482 U.S. at 393 (internal citations omitted); see also Ansley v.
5 Ameriquet Mortgage Co., 340 F.3d 858, 862 (9th Cir. 2003) (observing the "Supreme Court
6 has identified only three federal statutes that satisfy [the complete preemption] test"). In the
7 Ninth Circuit, complete preemption requires the presence of both "conflict preemption" and
8 "displacement preemption." Botsford v. Blue Cross & Blue Shield of Montana, 314 F.3d
9 390, 393 (9th Cir. 2002). Conflict preemption exists when federal law conflicts with state
10 law. Id. Displacement preemption is satisfied when federal law provides a remedy that
11 displaces state law remedies. Id. The Court finds that the federal regulations at issue do not
12 satisfy the requirement of displacement preemption. Thus, there is no federal question
13 jurisdiction.

14 In this case, conflict preemption exists. FRSA contains an express preemption clause,
15 which reads as follows:

16 Laws, regulations, and orders related to railroad safety
17 and laws, regulations, and orders related to railroad
18 security shall be nationally uniform to the extent
19 practicable. A State may adopt or continue in force a
20 law, regulation, or order related to railroad safety or
security until the Secretary of Transportation . . .
prescribes a regulation or issues an order covering the
subject matter of the State requirement." 49 U.S.C. §
20106.

21 In 1993, the U.S. Supreme Court found that when the Secretary of Transportation has
22 adopted a specific regulation covering an area of railway safety, a state common law action
23 for negligence based on that subject area is preempted. CSX Transp. v. Easterwood, 507
24 U.S. 658, 675 (1993) (holding that a different assertion of negligence by the railroad was not
25 preempted by general mandate in statute). Four of Plaintiffs' assertions of negligence for
26 failure to take certain actions are already governed by federal regulations as promulgated by
27 the Secretary of Transportation. (Doc. 23, pp. 7-11) As a result, those assertions conflict
28 with and are preempted by the relevant Federal regulations.

1 In this case, however, there is no displacement preemption. Displacement preemption
2 requires that there be some federal remedy for the Plaintiffs that displaces state law remedies.
3 Botsford, 314 F.3d at 397. In 2003, the Supreme Court held that complete preemption
4 requires an "exclusive cause of action." Beneficial Nat'l Bank, 539 U.S. at 11; see also
5 Lippitt v. Raymond James Fin. Servs., Inc., 340 F.3d 1033, 1042 (9th Cir. 2003) (applying
6 Beneficial National Bank to find there was not complete preemption of state claim); Sullivan
7 v. American Airlines, Inc., 424 F.3d 267, 276 (2d Cir. 2005) (stating that "[o]nly state-court
8 actions that *originally could have been filed in federal court* may be removed to federal court
9 by the defendant") (citing Caterpillar, 482 U.S. at 392) (emphasis added). The Supreme
10 Court stated that in the two categories of cases where it had found complete preemption up
11 to that point, namely Labor Management Relations Act and ERISA cases, the "federal
12 statutes at issue provided the exclusive cause of action for the claim asserted and *also set*
13 *forth procedures and remedies governing that cause of action.*" Beneficial Nat'l Bank, 539
14 U.S. at 8 (finding third category of case that provides complete preemption) (emphasis
15 added).

16 Applying the Supreme Court's precedent, there is no federal remedy for the Plaintiffs
17 under FRSA or LBIA. Recently, a District Court examined FRSA and found that it
18 contained "no express or implied cause of action authorizing suit by a private individual."
19 Nippon Yusen Kaisha v. Union Pacific R.R. Co., No. CV048861GAF, 2005 WL 1241866,
20 at *1 (C.D. Cal. May 10, 2005). Under FRSA, individuals can neither seek damages for
21 personal injury as a result of violations of the regulations nor enforce compliance with the
22 regulations. Id. at *2. Defendants, in their Response, argue that 49 U.S.C. § 20111,
23 providing the Secretary of Transportation with exclusive authority to impose civil penalties
24 for a violation of the regulations, demonstrates that there is displacement preemption. (Doc.
25 23, p. 11) However, Defendants do not indicate a federal regulation governing how private
26 individuals are to seek reparations for a railroad's failure to comply with the regulations or
27 to report non-compliance with the regulations to the Secretary of Transportation. Defendants
28 also argue that under Grable a federal cause of action is not required. (Doc. 23, p.11) But

1 Grable did not involve complete preemption, nor is there any language in the case suggesting
2 that the Court intended it to apply to complete preemption. See Grable, 125 S. Ct. at 2367
3 (addressing whether there is original federal question jurisdiction). In addition, Defendants'
4 argument that LBIA completely preempts Plaintiffs' assertion of an inaudible whistle is
5 clearly without merit as the relevant statute contemplates private civil actions. See 49 U.S.C.
6 § 20703(c) (providing that accident investigation reports by the Secretary of Transportation
7 may not "be admitted into evidence or used in a civil action for damages ") In addition,
8 while Defendants have cited numerous cases where a defense of preemption under FRSA
9 succeeded over a state claim, they have failed to cite any court that has found that FRSA
10 *completely preempts* a state claim so as to create federal jurisdiction.² (Doc. 23, pp. 7-11)
11 Due to the lack of a federal remedy for accidents involving private individuals, displacement
12 preemption is not satisfied and FRSA does not provide complete preemption.

13 **C. Acting under the Direction of a Federal Officer**

14 Finally, Defendants argue that they were acting under the direction of a federal
15 officer, and pursuant to 28 U.S.C. § 1442(a)(1) removal to federal court is permitted. (Doc.
16 23, p. 13) Defendants raise this ground for removal for the first time in their Response,
17 alleging the omission from their Notice of Removal was inadvertent.³ (Id.) Removal
18 petitions cannot be amended after the 30 day period allowed to file notice "to add allegations
19 of substance but solely to clarify defective allegations of jurisdiction previously made."
20

21 ²The Court has discovered only one case in which a state claim was completely
22 preempted by FRSA. Peters v. Union Pacific R.R. Co., 80 F.3d 257 (8th Cir. 1996).
23 However, that case is distinguishable because the claim was for the plaintiff's loss of an
24 engineer certificate and the Secretary of Transportation had issued regulations setting out a
25 specific dispute resolution procedure for challenging a railroad's denial of certification. Id.
26 at 261 (referring to 49 C.F.R. §§ 240.401-240.411); but see Chapman v. Lab One, 390 F.3d
620 (8th Cir. 2004) (finding that FRSA *did not completely preempt* state claim because it did
not provide a private right of action for plaintiff's situation).

27 ³Defendants acknowledge that they omitted this argument from their Notice of
28 Removal, however they allege that it was inadvertent and request that the Court consider
their Response as an amendment to the Notice. (Doc. 23, p. 13 n. 10)


1 Barrow Dev. Co., Inc., v. Fulton Ins. Co., 418 F.2d 316, 317 (9th Cir. 1969) (internal
2 citations omitted). Allying new grounds for removal constitutes an allegation of substance.
3 "It would be a substantial injustice to allow Defendants to remove a case on one ground and
4 then, when faced with a serious challenge to that ground, attempt to justify removal on an
5 entirely different, and untimely, ground." Hinojosa v. Perez, 214 F. Supp. 2d 703, 707 (S.D.
6 Tex. 2002), see also Charles Alan Wright & Arthur R. Miller, Federal Practice and
7 Procedure: Jurisdiction § 3733 (3d ed. 1998) (stating that "[c]ompletely new grounds for
8 removal jurisdiction may not be added" after the thirty-day period for seeking removal). For
9 these reasons, Defendants' allegation that they were acting under the direction of a federal
10 officer will not be considered.

11 Accordingly,

12 **IT IS ORDERED** that Plaintiff's Motion to Remand to State Court (Doc. 16) is
13 **GRANTED.**

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15 DATED this 17th day of August, 2006.

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Roslyn O. Silver
United States District Judge

UNITED STATES DISTRICT COURT

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TUCSON, ARIZONA 85701-5010

August 18, 2006

Michael Jeans, Clerk
Maricopa County Superior Court
201 West Jefferson
Phoenix, Arizona 85003-2205

ATTN: Supervisor, Lower Level File Room

RE: REMAND TO MARICOPA COUNTY SUPERIOR COURT

District Court Case Number: CV 06-207-PHX-ROS

Superior Court Case Number: CV2005-019086

Dear Mr. Jeans:

Enclosed is a certified copy of the Order entered in this Court on
8/18/06 remanding the above case to Maricopa County Superior
Court for the State of Arizona.

Sincerely,

RICHARD H. WEARE, DCE/CLERK OF COURT

S/L. Fettis
Deputy Clerk

Enclosure

cc : All Counsel of Record